reading matter, including "anti-ETS" articles. They are asked for a genuine opinion as independent consultants, and if they indicate an interest in proceeding further a Philip Morris scientist makes contact. Philip Morris then expects the group of scientists to operate within the confines of decisions taken by PM scientists to determine the general direction of research, which apparently would then be "filtered" by lawyers to eliminate areas of sensitivity (p. 2).

As this observer notes, "Although the industry is in great need of concerted effort and action in the ETS area, the detailed strategy of Philip Morris leaves something to be desired. The excessive involvement of external lawyers at this very basic scientific level is questionable" (Boyse 1988, p. 275). Chapman (1997) has described this 1988 memo as one that "promises to blow apart the façade that the tobacco industry carries out neutral research into passive smoking" (p. 1569).

A study published in May 1998 in the *Journal of the American Medical Association* (Barnes and Bero 1998) concluded that of the 37 percent (39 out of 106) of articles reviewed that concluded that ETS is not harmful to health, 74 percent (29 out of 39) of these were written by authors with tobacco industry affiliations. In this survey, the authors included articles whose stated or implied purpose was to review the scientific evidence that ETS is associated with one or more health outcomes. Articles were excluded if they did not focus specifically on the health effects of ETS or if they were not written in English. The authors noted, "In multiple logistic regression analyses controlling for article quality, peer review status, article topic, and year of publication, the only factor associated with concluding that passive smoking is not harmful was whether an author was affiliated with the tobacco industry" (p. 1566). The authors also found that the "conclusions of review articles are strongly associated with the affiliations of their authors. Authors of review articles should disclose potential financial conflicts of interest, and readers should consider authors' affiliations when deciding how to judge an article's conclusions" (p. 1566).

Other Industry-Sponsored Opposition to State Tobacco Control Initiatives and Advocates

Tobacco interests have used the courts proactively against other measures to prevent smoking. The proliferation of third-wave litigation against the tobacco industry has been matched by a more aggressive use of litigation by tobacco interests. For example, the industry and its allies filed a preemptive challenge, on state constitutional grounds, to the Florida legislation authorizing the state to recover tobacco-related health spending; the suit was ultimately unsuccessful (*Agency for Health Care Administration v. Associated Industries of Florida*, No. 86,213 [Fla. June 27, 1996], *cited in* 11.4 TPLR 2.113 [1996]). Similarly, the Governor of Mississippi, along with the tobacco industry, brought unsuccessful proceedings in the Mississippi Supreme Court to stop the Mississippi Medicaid reimbursement suit from going forward (*In re Kirk Fordice as Governor of Mississippi* [Miss. S. Ct.], *cited in* 12.1 TPLR 2.5 [1997]; *In re Corr-Williams Tobacco Co.* [Miss. S. Ct.], *cited in* 12.1 TPLR 2.1 [1997]). The tobacco industry also filed preemptive challenges on federal constitutional grounds to other state lawsuits even before these suits were filed (e.g., *Philip Morris Inc. v. Harshbarger*, Civil Action No. 95-12574-GAO [Mass. Nov. 22, 1996], *cited in* 11.8 TPLR 2.259 [1996]; *Philip Morris Inc. v. Graham*, Case No. 960904948 CV [Utah Dist. Ct. Salt Lake Cty.], *cited in* 12.1 TPLR 2.46 [1997]; *Philip Morris Inc. v. Blumenthal*, No. 97-7122 [2d Cir. 1997], *cited in* 12.5 TPLR 2.305 [1997]), and the industry has tried to remove these suits from state to federal court once they were filed (e.g., *Massachusetts v. Philip Morris Inc.*, No. 96-10014-GAO [D. Mass. May 20, 1996], *cited in* 11.3 TPLR 2.33 [1996]; *Louisiana v. American Tobacco Co.*, No. 96-0908 [La. July 16, 1996], *cited in* 11.5 TPLR 2.164 [1996]; *Maryland v. Philip Morris Inc.*, No. CCB-96-1691 [Md. July 31, 1996], *cited in* 11.5 TPLR 2.167 [1996]; *Connecticut v. Philip Morris Inc.*, No. CV960153440S [Conn. Oct. 9, 1996], *cited in* 11.7 TPLR 2.238 [1996]).

Arguably, the most sweeping litigation measure taken by the tobacco industry was initiated on August 10, 1995, when Philip Morris and others filed suit to block the FDA from regulating the sale, promotion, and distribution of cigarettes to minors. Discussed earlier in this chapter (see "Further Regulatory Steps"), the suit challenged the agency's authority to regulate cigarettes under the Federal Food, Drug, and Cosmetic Act. The lawsuit further charged that the proposed regulations would violate the tobacco companies' freedom of speech and would impair their ability to compete (Collins 1995b).

Tobacco companies have also used litigation tactically to impede the flow of damaging information. Brown & Williamson Tobacco Corporation brought suit against a paralegal aide accused of stealing confidential and potentially incriminating documents (*Wyatt, Tarrant & Combs v. Williams*, 892 S.W.2d 584 [Ky. 1995]). The documents, some of which were ultimately obtained by members of Congress, have shown that the tobacco manufacturers not only knew of both the addictive and the carcinogenic properties of tobacco

use but also concealed the evidence for decades (Shapiro 1994b). R.J. Reynolds brought suit (*R.J. Reynolds Tobacco Co. v. John Does*, 94-CVS-5867 [N.C., Forsyth Cty. 1994], *cited in* 9.4 TPLR 2.95 [1994]) to stop the solicitation of damaging information from tobacco insiders (*National Law Journal* 1994). In March 1994, Philip Morris filed a $10 billion libel suit in Virginia circuit court against the American Broadcasting Company (ABC) television network, a reporter, and a producer of the network's magazine program *Day One*. The suit concerned a broadcast segment that focused on Philip Morris' chief competitor, R.J. Reynolds Tobacco Company, and that accused R.J. Reynolds (and, in effect, the entire tobacco industry) of increasing the levels of nicotine in cigarettes to cause addiction among smokers (Chamberlain 1994; Janofsky 1994b). R.J. Reynolds subsequently filed a similar suit. In August 1995, after a siege of unusually aggressive discovery (Frankel 1995), ABC agreed to apologize for its "mistake" in accusing the manufacturers of "spiking" nicotine and to pay for Philip Morris' legal expenses, reportedly some $15 million (Freedman et al. 1995). ABC preferred to avoid the rigors of further litigation even though "the network's own lawyers felt they had a 65 percent chance of winning the case" (Landler 1995). Philip Morris subsequently took out full-page advertisements in the *New York Times*, *Washington Post*, *Wall Street Journal*, and other newspapers, proclaiming ABC's capitulation. That Philip Morris chose to respond to the news report with legal action, rather than mounting an aggressive advertising campaign as it has done in the past, is seen as reflecting the company's decision to turn over responsibility for public relations to its lawyers (Landler 1995).

Tobacco companies have heavily funded organizations that oppose smoke-free laws and policies. The National Smokers Alliance (NSA), for example, purports to be a membership organization on behalf of smokers. When NSA's Senior Vice President Gary Auxier was asked why his organization, which boasts that it is "a nonprofit, grass-roots membership organization with more than 3 million members," in fiscal year 1996 collected only $74,000 from dues (enough for 7,400 members) while its total receipts were more than $9 million, Auxier chose not to answer (Levin 1998). The NSA has vigorously attacked the smoke-free bar law in California, including publicizing bar owners who have engaged in civil disobedience (PR Newswire 1998b). Regarding this and other media-attracting actions, Morain (1998) points out, "Assisting that group is one of the world's largest public relations firms, Burson-Marsteller. The company has a long-standing account with the tobacco industry and is renowned for its ability to generate news coverage. As the organizers tell it, they're merely tapping the grass roots of the body politic, giving a voice to everyday people. Opponents deride the [supposed grassroots] campaign as 'Astroturf' " (p. A23).

In opposing a lawsuit based on harm from ETS, Philip Morris tried to subpoena scientific researchers' raw data that support epidemiologic research on the link between ETS and lung cancer. A state judge rejected the company's attempt to get the raw data, citing a 1990 Louisiana privacy law. The court found that "enforcement of the subpoenas would leave the researchers with the knowledge throughout continuation of their studies [that] the fruits of their labors had been appropriated by and were being scrutinized by a not unbiased third party whose interests were arguably antithetical to theirs" (*In re Philip Morris Inc.*, 706 So. 2d 665, 1998 La. App. LEXIS 138 [4th Cir. Jan. 28, 1998]).

One important industry tactic is to attack the integrity of leading tobacco control researchers and advocates (Sweda and Daynard 1996). For example, a group called Californians for Scientific Integrity (CSI) sued the University of California in 1997, in part, over Dr. Stanton Glantz's 1994 study on the economic impact of smoke-free restaurant laws. Public officials around the country have used that study to support passage of clean indoor air laws in their cities and towns. Funded by the NSA (Sullivan 1997), the CSI lawsuit alleged that public funds were used improperly in supporting the study. Earlier in 1997, the NSA had paid $10,000 to Michael Evans, clinical professor of managerial economics at the J.L. Kellogg Graduate School of Management at Northwestern University, to write a report that attacked the Glantz study on smoke-free restaurants (Price 1997). In November 1997, Sacramento County Superior Court Judge Joe S. Gray dismissed the CSI lawsuit, saying that "there were no grounds for the case" (Weinstein 1997b). A lawyer for the university wrote in a brief that led to the dismissal that the "true agenda of this action was patently obvious—to muzzle scientists whose research publications and speech on subjects relating to tobacco, tobacco control and the politics of tobacco have been a thorn in the side of the tobacco industry for decades" (Weinstein 1997b).

Industry-Sponsored Litigation Against Local Tobacco Control Efforts

The tobacco industry has used litigation, as wel as the threat of litigation, to try to thwart local mea sures to reduce tobacco use. For example, R.J. Reynold Tobacco Company financed a 1994 lawsuit filed by lc cal restaurant owners in Puyallup, Washington (Suttl

1994). The suit alleged that the recently enacted ordinance requiring that restaurants be smoke free was preempted because state law permitted smoking sections in restaurants and that the city had unlawfully and substantially deprived the plaintiffs of their rights guaranteed by the U.S. Constitution. Even though the legal arguments seemed dubious, the City Council decided to repeal the ordinance rather than expend the funds necessary to fight the lawsuit (Sweda and Daynard 1996).

In contrast, a board of health regulation banning all public smoking in Northampton, Massachusetts, was unsuccessfully challenged in 1994 (*Alexander's Restaurant, Inc. v. City of Northampton*, Civil Action No. 94-307 [Mass. Super. Ct. Oct. 25, 1994]).

Philip Morris joined with some local businesses to file a lawsuit on February 1, 1994, against the city of San Francisco to try to block an ordinance banning smoking in public buildings (Holding 1994; Schmeltzer and Arndt 1994). The plaintiffs argued that the ordinance was preempted by state rules governing workplace health and safety. However, five months later, California Governor Pete Wilson signed into law a measure banning smoking in most indoor workplaces and allowing local governments to enforce even stricter antismoking ordinances. The tobacco industry shifted away from its lawsuit against San Francisco and sponsored Proposition 188, an initiative that would eliminate local smoking laws and replace them with a weaker statewide standard (Epstein and Russell 1994). Although the tobacco industry spent $18.9 million on behalf of Proposition 188, about 18 times the amount spent by opponents, California voters resoundingly rejected the measure. Proposition 188 garnered less than 30 percent of the vote (Morain and Ellis 1994).

Local restrictions against cigarette vending machines have increasingly come under attack by cigarette distribution companies suing in several states (Schmit 1994; Sullivan 1994). In one such instance, the Massachusetts Supreme Judicial Court unanimously upheld a Provincetown bylaw that banned cigarette vending machines from that town (*Take Five Vending, Ltd. v. Town of Provincetown*, 415 Mass. 741, 615 N.E.2d 576, 1993 Mass. LEXIS 440 [Mass. Mar. 4, 1993]).

In addition to the above-mentioned cases, other local ordinances forbidding tobacco use in public places and regulating various forms of outdoor advertising have been challenged. As discussed earlier in this chapter (see the case description of *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore* in a subsection of "Constitutionality of Regulating Tobacco Advertising"), the outcomes of these challenges have been mixed.

Anticipatory Effects

Law works not only by coercive imposition but also by signals about authoritative (and potentially changeable) norms and about the potential disposition of legal coercion. Litigation may have an effect not only on those who are parties to it but also on other potential legal actors (plaintiffs, defendants, and attorneys who learn about the litigation) (Galanter 1983). Depending on the outcome of a litigation, similarly situated injured parties, for example, may abandon or modify—or conversely, may decide to continue—their risk-creating behavior or may be either encouraged to make a legal claim or discouraged from claiming. Lawyers may be encouraged to mount or discouraged from mounting claims or defenses. Uninvolved actors (such as potential business partners) who anticipate dealing with parties or potential parties may respond to litigation signals by modifying (or even terminating) their dealings with those parties. Such signals may be derived not only from authoritative decisions but also from the process of the litigation itself, which may exhibit advantages to be gained or costs to be avoided. For example, news organizations viewing the fierce and expensive industry response to critical depiction may hesitate to portray industry practices negatively (Freedman and Stevens 1995).

More often, third-wave tobacco litigation provides dramatic evidence of the indirect, anticipatory effects of litigation on reducing tobacco use. In early 1995, three prominent manufacturers recoiled from business dealings with cigarette makers to avoid the risk of getting embroiled in liability litigation. The Manville Corporation sued R.J. Reynolds Tobacco Company for a declaratory judgment that the corporation does not have a contract to supply fiberglass for cigarette filters (Appleson 1995). A few days later, Harley-Davidson, Inc., responding to a 1993 suit by the Lorillard Tobacco Company to enforce an agreement licensing the motorcycle maker's name for a brand of cigarettes, countersued, alleging that tobacco liability risks reduced Lorillard's ability to fulfill its contract (Rose and Hwang 1995). Papermaker Kimberly-Clark Corporation (which had been named a defendant in the West Virginia health care provider suit), the world leader in tobacco papers, decided to sell its cigarette paper business. The company denied that liability fears or shareholder activism played any part in its decision, but analysts said that such concerns were dominant factors (Collins 1995a). Other companies, such as Pfizer, have adopted policies "prohibiting units from doing business with Big Tobacco and its suppliers" (Mallory 1995, p. 39).

Another set of actors responsive to signals about liability are insurers. Presumably, virtually all of the suppliers and professionals who serve cigarette makers carry liability insurance. The tobacco manufacturers themselves have been insured for at least some liability risks, although the amount of insurance coverage of the tobacco companies is unknown (Reidy and Carter 1995). If any of these insured parties are found liable for promoting or selling tobacco products, the insurers can be expected to contest coverage, using as defenses against liability to the insured many of the same arguments that plaintiffs use to establish the liability of the insured. If, for example, liability involves attribution to the industry of knowledge of a causal link to disease or concealment of that information, then to defeat coverage, the insurer may likewise claim that the insured had wrongfully and knowingly obtained coverage for a business practice whose dangers were concealed from the insurer. "In effect," note two analysts, "the insurance industry will have to prove the very thing the policyholder is trying to deny in the tobacco-related suits" (Reidy and Carter 1995, p. S38). Thus a "breakthrough" by tobacco plaintiffs may lead to a "second front" of liability battles between tobacco defendants and their insurers.

Indeed, in 1996, Imperial Tobacco Limited (No. 500-05-014084-964 [Canada S. Ct., Prov. of Quebec, Dist. of Montreal Jan. 12, 1996], *cited in* 11.1 TPLR 3.39 [1996]) filed suit in the Superior Court of Quebec against two Toronto-based liability insurance companies--American Home Insurance Company and Commercial Union Assurance Company of Canada--demanding that they pay legal costs and any damages arising from a class action suit filed against Imperial in Ontario by Mr. David Caputo and three other persons in 1995. The Canadian class action suit, which has not yet been resolved, seeks damages on behalf of nicotine-addicted persons who have suffered because of their addiction to nicotine. Imperial claims to have had policies issued by the insurers obligating them to reimburse Imperial for legal costs incurred in the class action and to pay any further costs they may incur in this matter. The tobacco company is, in essence, asking the Superior Court of Quebec for a declaration that the two named insurance companies must pay all of Imperial's legal fees and all sums awarded by an eventual finding of liability by the Ontario court (*Tobacco Products Litigation Reporter* 1995b).

Finally, the investment community is greatly interested in the potential effects of legal liability on the future profitability and solvency of the tobacco companies. Tobacco cases are closely tracked by investment analysts, and "even interim events in peripheral cases can propel share prices in one direction or another" (Orey 1995, p. 70). The overhang of potential liability casts a shadow on tobacco stocks. Opinions differ about just how much these stocks are discounted for liability, but there is general agreement that the removal of the liability shadow would be worth many billions in increased stock value. This volatile combination of possible liability and latent value means that any breach in the previously impregnable liability ramparts would inaugurate a period of pronounced instability among tobacco investors. Some analysts imagine a zone of agreement that would locate a comprehensive settlement, which would in turn unlock the unrealized value of tobacco stocks while providing generously for the victims of tobacco. However, because present litigants cannot preclude future plaintiffs, it remains unclear whether litigation can provide the finality and closure that a comprehensive settlement would require. Litigation can set off ramifying effects and in general advance a formerly sluggish or obstructed state of affairs, but it is not clear whether it can contain these effects or design an all-encompassing resolution or policy.

Criminal Proceedings

Another arena in which attention is being given to the activities of the tobacco industry is the criminal justice system. Since 1995, the U.S. Department of Justice has conducted an ongoing investigation of the alleged violation of federal criminal laws by tobacco companies, tobacco company executives, tobacco industry-supported trade and scientific associations, and other entities that have conducted business with the tobacco industry.

The Justice Department initiated a formal investigation of the tobacco industry in response to the filing in 1994 of a comprehensive legal analysis, referred to as a prosecution memorandum, by Representative Martin T. Meehan (D-MA) with the U.S. Attorney General (Hohler 1994; Mallory 1994, 1995; Meehan 1994; Schwartz 1994; Miga 1995; Reuters 1996; Rodriguez and Taylor 1998). The prosecution memorandum petitioned the Justice Department to consider allegations that tobacco companies, tobacco company executives, and others had violated multiple criminal laws by providing false information to the FDA and the U.S. Surgeon General (18 U.S.C. section 1001), committing perjury in testimony before Congress (18 U.S.C. section 1621), perpetrating mail and wire fraud (18 U.S.C. sections 1341 and 1343, respectively), engaging in deceptive advertising practices (15 U.S.C. section 52), and

violating federal conspiracy and racketeering laws (18 U.S.C. sections 371 and 1962, respectively) (Meehan 1994; Shane 1997; *Corporate Crime Reporter* 1998; Clifford E. Douglas. The criminal investigation of the tobacco industry. Speech to the 13th Annual Conference of the Tobacco Products Liability Project; May 31, 1998; Boston; unpublished data).

Nature, Extent, and Focus of the Criminal Investigation

The Justice Department's investigation began as a preliminary inquiry focused on alleged perjury arising out of testimony delivered under oath by seven tobacco company executives who stated before a congressional subcommittee on April 14, 1994, that they did not believe that nicotine is addictive. The initial inquiry was later expanded to a formal grand jury investigation to address broader allegations that tobacco companies had, among other things, violated 18 U.S.C. section 1001.

Section 1001 prohibits the making of false statements to agencies and officials of the federal government (Hilts 1995; Novak and Freedman 1995; Appleson 1996; Blum 1996; Freedman 1996; Thomas and Schwartz 1996; Stohr 1997). In contrast to the level of proof required for a showing of perjury, section 1001 does not require a showing that a person knowingly lied under oath. It also allows prosecution for the withholding of information. Besides addressing potential section 1001 violations, the investigation continues to focus on other allegations of criminal conduct, including fraud, conspiracy, and racketeering (Cole and Taylor 1998; *Corporate Crime Reporter* 1998; Davis and Duffy 1998; Douglas, unpublished data; Duffy and Taylor 1998; Meier 1998c).

As of mid-1998, two federal grand juries were considering evidence of alleged tobacco industry wrongdoing. One grand jury was assigned to hear evidence presented by prosecutors from the Fraud Section of the Justice Department's Criminal Division regarding the broad allegations of criminal misconduct described above. The second grand jury was assigned to review information presented by the U.S. attorney for the Eastern District of New York. The work of the second grand jury concerned a related criminal investigation whose focus is an alleged conspiracy by major tobacco manufacturing companies to suppress legitimate medical research and promote biased research through the industry-sponsored Council for Tobacco Research. The Justice Department coordinated these complementary investigations (Cohen and Geyelin 1996; Thomas and Schwartz 1997; Davis and Duffy 1998).

A third criminal investigation was begun in 1995 to determine whether a major cigarette manufacturing company may have committed securities fraud by failing to disclose all it knew about nicotine. Under securities laws, companies are required to disclose significant information that may affect their stock price. The third investigation was initiated by the U.S. attorney for the Southern District of New York, following the publication of an investigative news article that reported that, based on a review of 2,000 pages of previously undisclosed documents, Philip Morris Companies Inc. had conducted many years of secret research into the pharmacologic effects of nicotine on the human brain and central nervous system (Freedman and Lambert 1995; Hilts and Collins 1995). The securities fraud investigation subsequently was consolidated with the main Justice Department investigation (Philip Morris Companies Inc. 1998).

Federal prosecutors have interviewed witnesses, compiled comprehensive company dossiers, and issued subpoenas, all under the supervision of the U.S. Attorney General. Several of the major cigarette manufacturing companies, such as R.J. Reynolds Tobacco Company and Philip Morris Companies Inc., as well as others, confirmed publicly that they are the subject of federal criminal investigations relating to the matters described above and that employees of the companies have received requests for information, including orders to produce internal documents and subpoenas to testify before the grand juries (Goshko 1995; Hilts 1995; Miga 1995; Associated Press 1996a,b; Bloomberg Business News 1996a,b; Federal Filings-Dow Jones News 1996; Johnston 1996; Jones 1996; Reuters 1996; Thomas and Schwartz 1996; Tribune News Services 1996; Weiser and Schwartz 1996; Shaffer 1997; Philip Morris Companies Inc. 1998).

In an April 1998 announcement that it had reached a cooperation agreement with a cigarette manufacturing company in support of the criminal investigation, the Justice Department identified five main subject matter areas on which it was focused (U.S. Department of Justice 1998). These were industry knowledge of the health consequences of smoking cigarettes and the addictive nature of nicotine; the targeting of children and adolescents by the industry; the manipulation of nicotine by the industry; control of research by the Council for Tobacco Research, including special projects conducted under the auspices of the council; and lawyer involvement in directing research or crafting false or misleading statements by any of the tobacco companies to the Congress, the FDA, and the American consumers concerning the above.

The announcement of the cooperation agreement was interpreted by legal experts as a sign that the criminal investigation was accelerating and the Justice Department was likely to file broad conspiracy charges against major cigarette companies in the future (Cole and Taylor 1998; *Corporate Crime Reporter* 1998; Douglas, unpublished; Duffy and Taylor 1998; Keil 1998; Levin and Ostrow 1998; Schwartz 1998a).

Key Sources of Evidence

The gathering of evidence by the Justice Department was advanced by the increased availability of an array of outside resources. These included the results of the extensive investigation of the tobacco industry conducted by the FDA from 1994 to 1996. The FDA's administrative record and investigative files were made available to the Justice Department, providing prosecutors and investigators with a significant body of information concerning tobacco manufacturers' knowledge of the addictive nature of nicotine and of the manipulation and control of the substance (*Federal Register* 1995b, 1996).

Another important source of information for Justice Department officials was the voluminous hearing record produced over a 10-month period in 1994 by the Subcommittee on Health and the Environment of the Committee on Energy and Commerce in the U.S. House of Representatives (1995a,b,c,d). The subcommittee, chaired by U.S. Representative Henry A. Waxman (D-CA), held numerous hearings in which testimony was obtained from a variety of witnesses, including the commissioner of the FDA, other federal government health officials, experts in nicotine addiction, tobacco company representatives, and former tobacco company scientists, among many others. In addition, Representative Waxman made available hundreds of previously secret nicotine research documents from the largest cigarette manufacturer by reading them into the public record on the floor of the House of Representatives in July 1995 (Associated Press 1995; *Congressional Record* 1995a,b; Schwartz 1995).

A third significant source of evidence in support of the Justice Department's criminal investigation was the emergence of internal tobacco company documents and testimony obtained in private lawsuits brought against tobacco industry defendants. Starting in 1994, these civil cases were initiated by state attorneys general, private classes of allegedly addicted and injured smokers, and individual plaintiffs, as described earlier in this chapter (see "The Third Wave of Tobacco Litigation"). The simultaneous litigation of numerous civil suits and the Justice Department's pursuit of its criminal investigation have produced a notable synergy. Millions of previously undisclosed tobacco industry documents that were obtained through the discovery process in civil lawsuits became, in many instances, readily accessible to federal prosecutors (Curriden and Rodrigue 1997; Geyelin 1998; Meier 1998c; Rodriguez and Taylor 1998; Scherer and Rybak 1998; Schwartz 1998c).

Initial Results of the Criminal Investigation

The Justice Department's ongoing investigation resulted in a first conviction in 1998. Under the terms of an agreement with the government, a biotechnology company, DNA Plant Technology Corporation, pleaded guilty to a misdemeanor charge of conspiring to break a law that had made it illegal to export tobacco seeds. The company was found to have engaged in such unlawful conduct in cooperation with a leading cigarette manufacturing company, identified as an unindicted coconspirator, with whom it had contracted to patent and develop a genetically altered tobacco code-named Y-1, which contained approximately twice the nicotine of ordinary tobacco. According to the Justice Department, the prosecution memorandum submitted by Representative Meehan, and the FDA, one of the goals of the cigarette company in conspiring with the biotechnology company was to develop a reliable source of supply of high-nicotine tobaccos that could then be used to control and manipulate the nicotine levels in several popular cigarette brands (Meehan 1994; *Federal Register* 1995b, 1996; Meier 1998d; Neergaard 1998; Schwartz 1998b; Schwartz and Connolly 1998; Taylor 1998; Taylor and Rodriguez 1998; Weinstein 1998b).

Beginning in 1997, the threat of criminal liability led certain individuals associated with the tobacco industry, such as Thomas S. Osdene, Ph.D., former Director of Research for Philip Morris Companies Inc., and Roger R. Black, current Director of Leaf Blending for Brown & Williamson Tobacco Corporation, to decline to answer questions under oath, choosing instead to invoke the Fifth Amendment right against self-incrimination (Geyelin 1997; Meier 1997; Weinstein 1997a; Anderson 1998). Some officials sought immunity from prosecution in exchange for their cooperation. Such offers were met with mixed responses from the Justice Department. Typically they were rejected, but in one publicized instance a request for immunity was granted (Geyelin 1997; Stohr 1997; Weinstein 1997a). The Justice Department granted immunity to Janis A. Bravo, a scientist formerly with DNA Plant Technology Corporation and coholder of the patent for

a high-nicotine tobacco plant called Y-1, developed for Brown & Williamson Tobacco Corporation.

Prognosis for Future Actions Through the Criminal Justice Process

Federal prosecutors possess considerable discretion both in terms of bringing charges against alleged wrongdoers and, in the event a strong case is developed, in seeking concessions from criminal targets in the plea-bargaining process. In light of these options, the Justice Department may seek to require tobacco manufacturing companies to modify their advertising and marketing practices so as to render them unappealing to young people, stop manipulating nicotine or using nicotine-enhancing chemicals, pay the federal government significant monetary penalties, and submit to regulation by the FDA (*Corporate Crime Reporter* 1998; Douglas, unpublished data).

Given the breadth and complexity of the criminal investigation of the tobacco industry, as well as the substantial burdens of proof that prosecutors must satisfy pursuant to the federal criminal statutes noted above, it is not possible to predict the outcome of the current criminal investigative process. From its inception, the investigation was anticipated to be a lengthy, complicated operation, in part because of the government's responsibility to process and review millions of pages of documents obtained from the tobacco industry and other sources (Thomas and Schwartz 1996).

With the Justice Department's accumulation of a growing body of evidence, including company documents and grand jury testimony, as well as the cooperation of the Liggett Group Inc. in support of the government's investigation, some legal experts have described the investigation as likely to result in further action (Cole and Taylor 1998; *Corporate Crime Reporter* 1998; Douglas, unpublished data; Duffy and Taylor 1998; Keil 1998; Levin and Ostrow 1998; Schwartz 1998a). One recent indicator that the issuance of indictments might be near was the delivery by Justice Department officials of letters to Brown & Williamson Tobacco Corporation and its officials, formally notifying them that they are the targets of a criminal investigation and that they face possible prosecution (Davis and Duffy 1998; Meier 1998c; *Wall Street Journal* 1998).

Further criminal action against the tobacco industry also raises the likelihood of diluting the influence of the industry's political lobby, thereby strengthening the ability of public health proponents to advocate for more stringent regulation of the manufacture, sale, distribution, advertising, and promotion of tobacco products (Douglas 1998).

Comment

After 40 years in which two waves of product liability litigation proved unavailing, there has been a recent upsurge of investment and innovation in tobacco litigation. This third wave of litigation departs from its predecessors in various ways:

- It moves away from exclusive reliance on smokers as plaintiffs, because so many cases have been decided against them as the victims of their own, informed behavior choices. Plaintiffs now include states, cities, pension funds, private health care providers, and persons exposed to ETS, none of whom can be blamed for smoking in the face of warnings.
- It multiplies the range of legal issues. Instead of focusing exclusively on common-law tort doctrine, third-wave litigation also invokes various statutory claims under consumer, antitrust, and other protective legislation.
- It expands from the classic private lawsuit by a discrete plaintiff to the class action device.
- It expands from solely seeking monetary damages to including claims for injunctive relief, medical monitoring, and the recovery of attorneys' fees.
- It shifts from a pure model of private law to mixed strategies in which private law is used to effectuate public policy by defending public fiscal interests and by enhancing the performance of statutory and regulatory controls of tobacco.
- It enlarges the roster of claimants' lawyers from those who specialize in representing individual plaintiffs in personal injury cases to include mass tort specialists and entrepreneurial securities class action lawyers. These attorneys, who typically practice in larger firms than individual plaintiff attorneys and have greater financial resources, are joined in more complex coalitions, including alliances with government lawyers.

Considerable uncertainty surrounds each of the several third-wave litigation initiatives and their potential contribution to reducing tobacco use. The prospect of using private law in these ways has captured attention only recently. In a wide-ranging 1993 review of tobacco policy (Rabin and Sugarman 1993), virtually all of the attention to private law was devoted

to smokers' product liability litigation. The newer legal theories that are now available to plaintiffs have considerable potential. Just how these initiatives will fare depends both on developments within the legal system and on forces outside it.

Normally, law incorporates and reflects public opinion. In a setting where smoking declines and becomes disreputable, particularly among the educated and influential (Zimring 1993), where smokers are increasingly viewed either as victims of coercion and addiction or as a minority group becoming more distanced from others (Gusfield 1993), and where evidence accumulates that the tobacco companies aggressively recruit new smokers and suppress knowledge of harmful effects of smoking, the law can be expected to respond to pressures to extend accountability and to provide remedies, if not to smokers then to those who are otherwise adversely affected by smoking.

However, other forces are working against an enlarged role for the civil justice system in the effort to reduce tobacco use. Important groups, displeased with the expansion of legal accountability, have mounted a protracted and influential campaign to curtail the civil justice system and weaken the position of claimants within it (Galanter 1993, 1994). Apart from these external constraints, the very magnitude of tobacco injury—the vast number of potential claimants involved—raises apprehension about the courts' institutional capacities to respond. Driven by the desire to conserve their scarce resources, courts will find ways to ration the judicial attention bestowed on any sizable set of related cases (Sanders 1992). As the size of the potential victim class increases, the chances for individualized judicial resolution decrease. It has been argued that the litigation about Agent Orange, the Bhopal disaster, and asbestos-related injury should be viewed as instances in which the sheer number of claims "simply overwhelm[ed] the capacity of legal institutions to meet victim compensation needs" and led to improvisation of formulaic administrative solutions (Durkin and Felstiner 1994, p. 159; cf. Henderson and Twerski 1991, on judicial aversion to such massive projects).

A balanced assessment of the possible contribution of private law initiatives to the effort to reduce tobacco use must consider not only the costs and benefits of the various initiatives but also the likelihood of accomplishing similar results by other institutional means (Komesar 1994). Typically, private law involves high transaction costs (Galanter 1994). Private law is by definition the creature of independent actors whose operations are not centrally managed and are at most partially and intermittently coordinated; each actor is trying to maximize its own gains as it defines them. No single initiative or the sum of such efforts will necessarily produce an optimal policy to reduce tobacco use. Yet private law may be a valuable component in reducing tobacco use precisely because it is an arena in which multiple courses of action are advanced by energetic champions who are open to new ideas and who, independent of government, can undertake innovative and even risky initiatives without securing official approval or competing for priority with other political commitments. Such initiatives may thus be able to stimulate and shape policy solutions. Other than as an agent or catalyst, however, it seems unlikely that the judicial forum, in a setting involving politically powerful actors and an unpredictable number of inchoate future claimants, will itself provide the ultimate policy resolution.

Conclusions

Advertising and Promotion

1. Since 1964, numerous attempts to regulate advertising and promotion of tobacco products have had only modest success in restricting such activity.
2. Current regulation in the United States is considerably less restrictive than that in several other countries, notably Canada and New Zealand.
3. Current case law supports the contention that advertising does not receive the protections of free speech under the First Amendment to the Constitution that noncommercial speech does.

Product Regulation

1. Warning labels on cigarette packages in the United States are weaker and less conspicuous than those of other countries.

2. Smokers receive very little information regarding chemical constituents when they purchase a tobacco product. Without information about toxic constituents in tobacco smoke, the use of terms such as "light" and "ultra light" on packaging and in advertising may be misleading to smokers.

3. Because cigarettes with low tar and nicotine contents are not substantially less hazardous than higher-yield brands, consumers may be misled by the implied promise of reduced toxicity underlying the marketing of such brands.

4. Additives to tobacco products are of uncertain safety when used in tobacco. Knowledge about the impact of additives is negligible and will remain so as long as brand-specific information on the identity and quantity of additives is unavailable.

5. Regulation of tobacco product sale and promotion is required to protect young people from influences to take up smoking.

Clean Indoor Air Regulation

1. Although population-based data show declining ETS exposure in the workplace over time, ETS exposure remains a common public health hazard that is entirely preventable.

2. Most state and local laws for clean indoor air reduce but do not eliminate nonsmokers' exposure to ETS; smoking bans are the most effective method for reducing ETS exposure.

3. Beyond eliminating ETS exposure among nonsmokers, smoking bans have additional benefits, including reduced smoking intensity and potential cost savings to employers. Optimal protection of nonsmokers and smokers requires a smoke-free environment.

Minors' Access to Tobacco

1. Measures that have had some success in reducing minors' access include restricting distribution, regulating the mechanisms of sale, enforcing minimum age laws, having civil rather than criminal penalties, and providing merchant education and training. Requiring licensure of tobacco retailers provides both a funding source for enforcement and an incentive to obey the law when revocation of the license is a provision of the law.

2. The effect of reducing minors' access to tobacco products on smoking prevalence requires further evaluation.

Litigation Approaches

1. Two historic waves of tobacco litigation were initiated by private citizens, were based largely on theories of negligence and implied warranty, and were unsuccessful.

2. A third wave has brought in new types of claimants, making statutory as well as common-law claims and using more efficient judicial procedures. Although several cases have been settled for substantial money and have yielded public health provisions, many other cases remain unresolved.

3. Private law initiative is a diffuse, uncentralized activity, and the sum of such efforts is unlikely to produce optimal results for a larger policy to reduce tobacco use. On the other hand, the litigation actions of individuals are likely to be a valuable component in some larger context of strategies to make tobacco use less prevalent.

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